ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals
for the
District of Columbia Circuit

Nos. 18-1001 and 18-1036

CAYUGA MEDICAL CENTER AT ITHACA, INC.,

Petitioner,

– v –

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR PETITIONER

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Pursuant to Fed. R. App. P. 28, Petitioner Cayuga Medical Center ("Petitioner" or "CMC") files this reply in support of its petition for review.

SUMMARY OF ARGUMENT

For the reasons set forth in CMC's initial brief, and those set forth in detail below, the Board's findings and conclusions should be rejected. Specifically:

1. The Board failed to meaningfully distinguish precedent finding that invitations to employees to report instances of harassment and intimidation to be lawful.

2. The Board's finding that CMC told a group of employees that it was "inappropriate" to discuss wages was not supported by any evidence to establish either the year or the context in which the alleged statement was made, and therefore, the purported violation was not supported by substantial evidence.

3. CMC, consistent with Board precedent and substantial evidence, lawfully issued a verbal warning to Scott Marsland for engaging in the unprotected activity of disparaging two of his co-workers in a group setting.

4. CMC's Code of Conduct policies requesting courtesy and respect are lawful under current Board law.

5. CMC lawfully disciplined, demoted and evaluated Anne Marshall, and the Board's findings to the contrary are unsupported by substantial evidence.

6. The Board erred in finding substantial evidence of interrogation and threats based on a vague recollection from an employee on what was "basically" said.

7. The Board erred in finding CMC violated the Act by advising employees that certain tabling in the cafeteria was not appropriate and by finding that the occasional removal of pro-union materials pursuant to an established policy of regularly removing non-business material in certain areas was unlawful.

8. The Board erred in issuing any remedy, and to the extent any remedy is upheld, the extraordinary remedy of a notice reading is inappropriate.

ARGUMENT

A. Petitioner's Lawful Communications Regarding Harassment and Intimidation Were Consistent with Board Precedent and the Violation Was Not Supported by Substantial Evidence

CMC's Vice President of Human Resources, Alan Pedersen ("Pedersen"), wrote two lawful emails in response to reports of bullying, intimidation, and threats made by employees regarding the issue of unionization. The Board's finding that these communications were unlawful is inconsistent with Board precedent and unsupported by substantial evidence.

In its Opposition, the NLRB: (1) unsuccessfully attempts to distinguish almost identical language in *First Student*, 341 NLRB 136 (2004) and *Ithaca Industries*, 275 NLRB 1121 (1985); (2) inaccurately contends that CMC provided no evidence that employees reported any incidents of bullying or intimidation; and (3) argues the Court cannot consider CMC's position that encouraging reports of harassment and intimidation is consistent with Title VII (and other anti-discrimination laws) based on an overbroad interpretation of Section 10(e) of the Act. As set forth in more detail below, each of these arguments should be rejected and the Board's finding of a violation overturned.

First, the NLRB's Opposition attempts to distinguish *First Student* and *Ithaca Industries* on the grounds that Pedersen's emails indicated that employees could report conduct if they "felt" harassed or intimidated as opposed to a statement that they could only report if they were in fact harassed or intimated. (NLRB Opposition, p. 25). In contrast to the NLRB's position, there is no meaningful distinction. It is difficult to imagine a situation where an employee may feel intimidated, but decide not to report because he/she determines that his/her feelings of intimidation are simply subjective, and therefore, not appropriate to report. The use of the term "feels" does not meaningfully

distinguish the language used by Pedersen from the language used in *Ithaca Industries* and *First Student*. Accordingly, the Board provided no meaningful explanation for departing from this Board precedent, and the violation should be overturned.

Second, the Board, in its Opposition, states that there was "no evidence that employees reported any incidents of bullying or intimidation." (NLRB Opposition, p. 26, citing Board Decision, p. 11, fn. 11). This finding is not supported by the record evidence. Specifically, Pedersen testified: "we had some employees go to their directors who indicated they had been subject to bullying or intimidation. And they wanted to know what steps they could take." (Tr. 795-96). The ALJ remarkably disregarded this statement because the words "harassment or intimidation" were used in Pedersen's emails communications as opposed to the words "bullying or intimidation." (Board Decision, p. 11, fn. 11). Even if Pedersen's testimony is rejected as being unrelated, there was record evidence that an employee left work crying because she felt bullied regarding the unionization issue. (Tr. 535-36; 544-45). Accordingly, the contention that there were no reports of bullying or intimidation is incorrect, and should not be considered.

Finally, the NLRB contends that CMC should be foreclosed under Section 10(e) of the Act from mentioning that Title VII and state anti-harassment laws encourage employees to report harassment. This contention is based on the fact that CMC did not make this specific statement in its Exceptions before the Board.

This contention is inconsistent with this Court's waiver analysis under Section 10(e):

> Cases interpreting Section 10(e) look to whether a party's exceptions are sufficiently specific to apprise the Board that an issue might be pursued on appeal . . . While we have not required that the ground for the exception be stated explicitly in the written exceptions filed with the Board, we have required, at a minimum, that the ground for the exception be evidenced by the context in which the exception is raised . . . In each case the critical inquiry is whether the objections made before the Board were adequate to put the Board on notice that the issue *might* be pursued on appeal.

Trump Plaza Assocs. v. NLRB, 679 F.3d 833, 829 (D.C. Cir. 2012) (citations omitted and emphasis added). Additionally, the primary consideration is whether the critical issue (*i.e.*, whether a specific violation of the Act is supported by

substantial evidence or consistent with Board precedent) has been raised. There is no requirement that every conceivable reason for why the particular finding should be overturned must be set forth in the Exceptions. *See BPH & Co. v. NLRB*, 333 F.3d 213, 219 (D.C. Cir. 2003) ("[D]espite the fact that the Company's attack on the Board's new application [of its precedent] is made for the first time before us, the Board was sufficiently apprised, for the purpose of section 10(e), of the critical issue—whether the Board's [unfair labor practice] findings are supported by substantial evidence."). Finally, when the Board itself addresses the issue in its decision, this provides evidence that the Board was adequately put on notice of the issue. *See Pa. State Corr. Officers Ass'n v. NLRB*, 2018 U.S. App. LEXIS 18382, *14-16 (D.C. Cir. 2018) (finding no waiver under Section 10(e) where "The Board thus responded to—and thereby acknowledged its awareness of—both the relevant exceptions").

In this case, CMC's Exceptions clearly put the Board on notice of its position on the "critical issue" – that encouraging complaints of harassment and intimidation was lawful under the Act and consistent with Board precedent. In its Exceptions, CMC contended that the "Board has held that employer communications relating to legitimate threats and harassment have been found not

to violate the Act." (CMC Exceptions, p. 8). *See Trump Plaza Assocs. v. NLRB*, 679 F.3d 822 (D.C. Cir. 2012). CMC's failure to specifically mention Title VII in its Exceptions as one of the reasons why such communications should be viewed as lawful does not foreclose the Court from considering this relevant point in its assessment.

B. The NLRB's Opposition Highlights the Lack of Substantial Evidence to Support the Finding that Employees were Informed it was Inappropriate to Discuss Salary/Wages

Substantial evidence cannot support a finding that Pedersen ever told employees that they could not discuss their wages. As set forth in CMC's initial brief, the flimsy basis for the Board's finding was Anne Marshall's testimony that a group of unnamed nurses were lingering on the floor of the hospital (i.e., a working area on what appeared to be working time) discussing their salaries, and Pedersen allegedly told the group that this was "inappropriate."

Ms. Marshall could not name the date, month, or even the year of when this alleged conversation took place; the specific context of what exactly Pedersen was referring to as inappropriate; or which nurses were involved in the discussion. Ms. Marshall also admitted that Pedersen never explicitly told this group of nurses that they were not supposed to be talking about salaries. (Tr. 381-83). Because

Marshall could not name the other nurses allegedly involved or even the general date of when this conversation occurred, there was no way for CMC to corroborate Ms. Marshall's flimsy accusation, which Pedersen had no recollection of ever having occurred. (Tr. 382-83, 805-806).

Allowing the finding of a violation to stand, despite the fact that the factfinder had no information to decipher what exactly was referred to as inappropriate (e.g., gathering of nurses together on working time discussing non-work issue, the substance of the discussion, etc.); what year the alleged violation occurred and no additional witnesses to corroborate the alleged version of events; would significantly lower the burden for unfair labor practice findings. It would also undermine the six-month statute of limitations period under 10(b) of the Act and the due process rights of parties to be provided with reasonably particularized accusations in order to be capable of formulating a complete response.

The NLRB's Opposition contends that a letter sent to nurses in 2011, in which Pedersen asked nurses to keep news of a specific pay raise confidential, suggests a general policy restraining the discussion of wages and supposedly corroborates that Pedersen ***may have*** told this group of nurses that discussing salaries was inappropriate. (GC Ex. 5, 6). Using such a speculative leap to

overcome the lack of any actual evidence to establish a violation should not be permitted by this Court. In doing so, the Board chose to ignore evidence that no employee had ever been disciplined for discussing wages (Tr. 804-05), which could lead to the equally speculative conclusion that Pedersen did not make this statement. That the parties are only left to wildly speculate as to what was actually said, if anything was said at all, only highlights the lack of actual evidence necessary to establish a violation.

C. Scott Marsland Did Not Engage in Concerted and Protected Activity, But Instead, an Individualized and Disparaging Attack on the Competency of Two Co-Workers

CMC lawfully disciplined Scott Marsland with a verbal warning for disparaging the competency of two co-workers in a group setting.

Even if CMC were to accept (which it does not and reasserts that Marsland's comments were not concerted for the reasons set forth in its initial brief) that the competency of these two nurses was specifically discussed amongst nurses as the NLRB's Opposition alleges (Opposition, p. 49), the disparaging nature and the way in which they were presented exceeded the boundaries of the Act's protection.

In its Opposition, the NLRB cites to *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 124 (2d Cir. 2017) and *Datwyler Rubber & Plastics Inc.*, 350 NLRB 669, 669-70 (2007), to contend that Marsland's disparaging statements should be protected.

First, in *Pier Sixty*, an employee made a posting on Facebook criticizing his manager that included profane outbursts directed at the managerial employee. *Pier Sixty*, 855 F.3d at 134. Significantly, this outburst was found lawful primarily because (1) the outburst was directed at a managerial employee, and employees have more latitude for such conduct toward supervisory employees; and (2) there was significant evidence that the employer allowed similar profane outbursts in the workplace without disciplining employees.

In contrast, as applied to Marsland's outburst: (1) the disparaging comments were directed at co-workers and not a managerial employee; and (2) there was zero evidence that any similar disparaging comments in front of a group of employees were ever allowed by CMC. (Tr. 587-88). As set forth in CMC's initial brief, the fact that Marsland did not yell or use profanity should not be the sole basis to evaluate the significance of defamatory comments attacking the very livelihood of these two nurses. Such an attack is far more sinister and harmful than uttering a

profanity or raising one's voice, and this is why CMC has never allowed such attacks in the past.

The second case cited by the NLRB, *Datwyler Rubber & Plastics Inc.*, 350 NLRB at 669-70, also involved a comment directed at a managerial employee. The employee stated that the manager was the "devil" and that "Jesus Christ would punish him and the Respondent for continuing the 7-day schedule" after the manager threatened the employee that she would be discharged if she did not like the schedule. *Id.* The case is neither comparable nor relevant as the conduct was directed toward a manger and was stated in response to a direct threat made by the manager.

In its Opposition, the NLRB once again argues that CMC should be foreclosed from making certain arguments because those arguments were not raised in its Exceptions. This contention has no merit. First, the NLRB argues that CMC should be foreclosed from arguing that Marsland's conduct was so opprobrious to have lost protection under *Atlantic Steel* because CMC's Exceptions did not specifically cite to *Atlantic Steel*. However, whether conduct is so opprobrious as to lose the protection of the Act is the focus of the *Atlantic Steel* doctrine, and in its Exceptions, CMC stated that it objected to the ALJ's conclusion

that "Mr. Marsland's conduct was protected and not sufficiently opprobrious to warrant discipline." (CMC Exceptions, p. 29-30). Because CMC specifically raised the argument that Mr. Marsland's conduct was sufficiently "opprobrious" to warrant discipline, there should be no legitimate dispute that this issue was raised before the Board.

Second, in its initial brief, CMC mentioned that Mr. Marsland's comments amount to defamation under State law, which only further explained the basis for why this conduct lost the protection of the Act. This was reasonably encompassed within the issues presented to the Board for review. The fact that this argument was not raised word-for-word in CMC's Exceptions does not foreclose the Court from considering this point in evaluating whether the conduct remained protected.

In sum, Mr. Marsland's statements, which disparaged and defamed two co-workers in the presence of at least 11 other co-workers, cannot be condoned by the Board, this Court, or in any workplace. While the result may be different if these statements were directed at the competence of a manager or if such attacks were

commonly accepted at the CMC workplace, such evidence is not present here, and thus, this low-level verbal warning was entirely legitimate.[1]

D. The Board Erroneously Concluded that CMC Violated Sections 8(a)(1) and (3) of the Act by Disciplining, Demoting and/or Issuing an Adverse Performance Evaluation to Anne Marshall

The Board found that CMC discriminated against Ms. Marshall due to her Union support and acted with a retaliatory motive when it (1) suspended her on June 26 due to an incident of misconduct; (2) issued a documented verbal warning on July 10 due to another incident of misconduct; (3) demoted her from the position of Charge Nurse on August 31 due to further acts of misconduct and a failure to carry out her Charge Nurse responsibilities; and (4) issued an unfavorable performance evaluation to her on October 30.

These findings are not supported by substantial evidence. Rather, the evidence clearly establishes that each action taken by CMC was a measured and appropriate response to specific instances of blatant misconduct by Ms. Marshall.

[1] In his decision, the ALJ attempted to compare apples to oranges by equating monthly patient surveys filled out by patients with no expertise in the medical field to an evaluation by a fellow co-worker that a nurse is incompetent to perform their job. (Tr. 606-607). To the extent the ALJ relied on this comparison in reaching his conclusion, his analysis should be rejected.

At all times, CMC was fully aware that any adverse actions against Ms. Marshall could be perceived as retaliatory due to her active role in the Union's organizing campaign, and therefore proceeded very cautiously to ensure that none of the steps it took could reasonably be viewed as an overreaction or an unduly harsh response to her behavior. The overwhelming evidence establishes that the actions in issue were NOT taken against Ms. Marshall because of her protected activity, but rather were taken IN SPITE OF her protected activity because her misconduct was so blatant that it could not reasonably be overlooked. It is axiomatic that the protection afforded by the Act does not render employees who engage in misconduct immune from any and all discipline.

Moreover, the policies contained in the Nursing Code of Conduct that Ms. Marshall violated were lawful under *Boeing Company*, 365 NLRB No. 154 (December 14, 2017). Any argument by the NLRB that CMC has waived such an argument pursuant to the limits of Section 10(e) is without merit. A review of CMC's Exceptions concerning the ALJ's findings states as follows with regard to CMC's Nursing Code of Conduct:

> CMC submits that this [Nursing Code of Conduct] does not violate Section 8(a)(1) merely because it is written in

> broad terms. The notion that nurses should generally engage in professional, courteous and respectful interactions with others in the performance of their duties reflects longstanding and nationally recognized standards for the nursing profession, not to mention common sense and societal norms of civility. (Tr. 775-76; ee also GC-Ex. 3, p.1 under "Supporting Data"). There is nothing in the Code of Conduct that prevents nurses from complaining about their terms and conditions of employment or otherwise engaging in protected concerted activity.

(Objections, p. 4-5). Accordingly, CMC's Exceptions were clearly broad enough to put the Board on notice that this issue may be pursued on appeal. *See Trump Plaza Assocs.*, *supra*, at 829; see also, **Section A**, *supra*.

1. <u>The June 26 Suspension</u>

The contemporaneous documents establish that during the midst of a staffing crisis, Ms. Marshall was dishonest about making calls to shore-up staffing in the ICU on June 26. She indicated to Mr. Joel Brown and Ms. Jessica Miller that she

did not make any calls, while separately telling Ms. Cindy Brown and Ms. Florence Ogundele that she had made calls. It was not the testimony or accounts of the witnesses that shifted, as the NLRB contends, but instead, it was Ms. Marshall who was not honest about what she had done in her capacity as Charge Nurse to fill the staffing gaps during that shift. At a time when patient care and staffing were critical, Ms. Marshall was indignant and contradictory in what she reported about what she had or had not done to address the staffing issue. (R. 1(a) –(m), 2, 6-12).

Based on the information obtained from the witnesses, CMC reasonably determined that Ms. Marshall did not make the necessary calls to fill the staffing gaps as was required of her in her role as Charge Nurse. Indeed, Mr. Brown and Ms. Ogundele both recounted that Ms. Marshall explicitly admitted to Mr. Brown that she did not make any staffing calls, (R. 1(l), 1(m), and 3), and Ms. Miller similarly witnessed that Ms. Marshall stated to her that she did not make any staffing calls,(R. 1(k)). Additionally, Mr. Brown immediately secured a replacement upon making a call, underscoring CMC's reasonable conclusion that Ms. Marshall did not make the necessary phone calls to secure staffing. Thus, it was legitimate to suspend Ms. Marshall for such conduct given the significant

impact understaffing in the ICU has on patient health and safety, not to mention her dishonesty and her clear dereliction of duty as a Charge Nurse.

The NLRB's attempt to besmirch CMC's investigation by calling into question why so many high-level individuals were involved should be rejected, not only because their argument is speculative in nature, but also because as previously noted, given that Ms. Marshall was an active Union supporter, CMC was sensitive to the fact that any disciplinary action taken against her could be perceived as retaliatory, and wanted to ensure that any action that was ultimately taken was appropriate and justified. Here, CMC management considered the witness statements and the fact that Mr. Brown immediately secured a replacement, and reasonably concluded that Marshall did not make staffing calls, was untruthful in stating she did. Given the seriousness of her misconduct, placing her on a brief disciplinary suspension actually demonstrated leniency on CMC's part and was not unlawful. (Tr. 779-80).

2. Ms. Marshall's Confrontation with Mr. Brown

The evidence shows that Ms. Marshall engaged in an aggressive and confrontational dialog with Mr. Brown on July 3. She was angry toward him and invaded his personal space which included blocking his movements. With no other

option, Mr. Brown threatened to call security. Accordingly, Ms. Marshall received the July 10 documented verbal warning for this unacceptable behavior.

With seemingly no other way to excuse or justify this interaction, the NLRB attempts to downplay this incident by defaulting to the tired stereotypical argument that Mr. Brown, a male, could not possibly have been threatened by a 4'11" female. Such a stereotypical and archaic argument should be rejected outright. The NLRB's argument is based on the unfounded and frankly preposterous assumption that Ms. Marshall's aggressive behavior could only be considered misconduct if it placed Mr. Brown in fear of being physically harmed by her. That is not the point and was never the point. Her aggressive behavior was obviously inappropriate, and the NLRB's archaic argument to the contrary must be rejected.

Further, this confrontation occurred at a time when Ms. Marshall had just filed a sexual harassment complaint against Mr. Brown with the State Division of Human Rights (which was found to be without merit). (Tr. 298-300). Mr. Brown, who had been charged with a meritless harassment complaint by Marshall, had every reason to be sensitive and intimidated by Ms. Marshall's conduct, demeanor and physical invasion of his personal space. Accordingly, Ms. Marshall's conduct, not her union activity, was the basis for her July 10 documented verbal warning.

3. Ms. Marshall's Demotion from the Charge Nurse Position

In late August, Sandra Beasley was new to the position of Interim Director of the ICU at CMC. (Tr. 914). During Ms. Marshall's first encounter with Ms. Beasley in that position, Ms. Marshall, who was a Charge Nurse with the responsibility to lead by example, treated Ms. Beasley with rude indifference. (Tr. 237). The evidence shows that Ms. Marshall, despite Ms. Beasley's request, refused to escort her to the morning bed meeting so as to become more familiar with CMC operations, and when questioned about it, stated, in essence that she was not Ms. Beasley's supervisor. Further, despite the issues Ms. Marshall had in June with regard to failing to call-in staff, again, Ms. Marshall refused to help fill-in scheduling holes. The fact that Ms. Marshall proceeded to direct a profane gesture toward Ms. Beasley was the icing on the cake. (Tr. 914-915).

Given Ms. Marshall's first impression to her brand new boss, regardless of her Union activity, it defies logic to think that Ms. Beasley would have wanted to keep her in a leadership role under her direction. The NLRB harps on the ALJ's tortured analysis that CMC invented the claim that Ms. Marshall flipped off Ms. Beasley, which should be rejected. First, this is not true (Tr. 914-915). Second, even assuming Marshall did not raise her middle finger at Beasley, her disdainful

attitude toward her new supervisor in refusing to accompany her to the bed meeting and her refusal to carry out her duty as a Charge Nurse to make calls to secure additional staffing was more than enough to warrant removing Marshall from the Charge Nurse role.

4. Ms. Marshall's Evaluation

Given the transition of staff, in 2015, Assistant Vice President of Patient Services Crumb completed the performance evaluations for the ICU staff nurses. Thus, Crumb advised the ICU nurses in a staff meeting that for 2015 they would start with the same rating as they had in 2014, then she would review the personal accountability section of the evaluation and set goals for next year. (Tr. 98-100, 932).

The personal accountability section included licensure, mandatory attendance and work behaviors, among others. (Tr. 933, GC Ex. 29(h) and (g)). For the personal accountability section in 2015, Ms. Marshall lost 1.0 points for demonstrating unacceptable behavior. This loss was based on her dishonesty regarding call-ins on two separate occasions and her dishonesty during the evaluation period. (Tr. 938). This loss of 1.0 point had absolutely nothing to do with her union support and everything to do with her failure to provide truthful

information regarding staffing primarily during the events leading up to her suspension. (Tr. 938).

Contrary to the NLRB's assertion that Ms. Marshall was the only ICU Nurse whose 2015 performance evaluation was not identical to her 2014 performance evaluation, Ms. Crumb's uncontroverted testimony was that several nurses had lost 1.0 point from their 2014 to their 2015 overall evaluation score for various reasons. (Tr. 938).

In sum, all actions taken toward Marshall were carefully (and if anything, leniently) taken by CMC based on substantial evidence of misconduct and wrongdoing, and the Board's findings to the contrary are without merit.

E. The Board Erred in Finding CMC Violated the Act by Interrogating and Threatening Employees in a One-On-One Meeting

There is not substantial evidence to support the Board's finding that Interim ICU Director, Joel Brown, unlawfully interrogated and threatened Ms. Marshall.

As set forth in CMC's initial brief, Ms. Marshall admitted that her recitation of her conversation with Brown was based on her recollection of "basically" what was said. This is insufficient evidence in an area of the law where distinctions between lawful and unlawful language are razor-thin, and what was "basically"

said should be held insufficient to establish a violation. Significantly, while Marshall indicated that she had contemporaneous notes of the meeting with Mr. Brown, the General Counsel chose not to put these notes into evidence. (Tr. 373-376). The General Counsel's decision not to introduce the best evidence of what actually was stated in the one-on-one meeting clearly supports an inference that the best evidence was harmful to the General Counsel's case.

In short, Marshall's non-specific testimony of what was allegedly said, unsupported by notes she allegedly kept, is insufficient to establish substantial evidence of a violation and should be reversed.

F. The Board's Findings Regarding Certain Facebook Postings by Florence Ogundele Should Also Be Rejected

Contrary to the NLRB's contention, there is no clear inference that a Facebook comment made by Florence Ogundele (GC. Ex. 8) was made directly in response to protected and concerted union activity, as opposed to more personal attacks that were made against Ms. Ogundele in a Facebook comment thread. In fact, Mr. Marsland admitted that Ms. Ogundele, for a very long period, appeared "to be a friend and at least a neutral party in relation to the union organizing" (Tr. 513), further suggesting that it was not protected activity that was the impetus for

Ms. Ogundele's passionate response, but rather what she perceived as personal attacks made by employees on the Facebook comment thread.

While the General Counsel presented only selective portions of the comment thread, Mr. Marsland admitted he made other posts about Ms. Ogundele that were not included by the General Counsel (nor provided to CMC). (Tr. 516-517, 727-30). Similarly, Ms. Ogundele testified that employees, including Marsland and Marshall attacked her on this Facebook thread by stating she "sold her soul to the devil" and other similar comments, which Ogundele considered as an affront to her religious beliefs. Far from being clear that Ogundele was responding to only Marsland's comment, Ogundele testified she was responding to all of the comments in the thread and not just Marsland's post. (Tr. 733, 764).

Significantly, in GC Ex. 8, there is no reference to union activity, and Ms. Ogundele, supporting her position that she was responding to personal attacks, stated that she "will not compromise [her integrity] to lie for anyone" and that Mr. Marsland "cannot bully or intimidate me" (GC Ex. 8). Again, it cannot be reasonably inferred that this post was conveying threats of employment-related reprisals due to union support, because the postings say nothing about this and occurred in the context of an exchange of personal insults outside the workplace.

In addition, the NLRB also points to an alleged violation for Ms. Ogundele's comments in GC Ex. 9. However, even if statements therein were found to be unlawful on their face, the record evidence suggests that the posting was only up for two hours (Tr. 84), and there was no evidence that an employee actually saw the posting. CMC contends that a posting made, then deleted, which is never witnessed by an employee, would be equivalent to a supervisor yelling a threat in an empty hospital. Where there is no evidence that an employee viewed the threat, there is no basis for a violation.

Accordingly, for these reasons and those set forth in CMC's initial brief, the Board lacked substantial evidence to find a violation for Ms. Ogundele's Facebook posts.

G. CMC Did Not Unlawfully Interfere with the Union's Table Display

CMC readily admits that Pedersen communicated his mistaken belief to two employees that their table display in the cafeteria was inappropriate.

As set forth in Petitioner's initial brief, these communications did not result in discipline, did not involve confiscation of materials, and additional tabling was allowed to continue unabated for many months after these communications were made. Because of this, these isolated incidents do not amount to a violation under

the Act, and because it was obvious to employees that they could continue to table without risk of discipline, such violations were de *minimis* and no remedy is necessary.

H. The Board's Findings that CMC Unlawfully Removed Union Literature are Unsupported by Substantial Evidence

As set forth in CMC's initial brief, CMC afforded pro-union employees every opportunity on a daily and constant basis to post materials, except in areas where the employer had an established practice of regularly removing non-business related material that is posted or left in the facility. (Tr. 818). The evidence cited by the NLRB in its Opposition and by the ALJ does not specify the locations at which managers/supervisors allegedly removed these materials.

Significantly, the General Counsel's witnesses admitted that depending on where it is in the hospital, there were different posting rules, with hospital-only postings being permitted in certain locations, and employee postings for non-business purposes, such as car washes or cookie sales, being permitted in other locations. (Tr. 453). In fact, Ms. Marshall admitted that on a bulletin board for hospital sponsored events only, a supervisor, Ms. Henderson, took down a salsa dancing event posting, a Jehovah's witness card, as well as a Union posting. (Tr.

417). The ALJ also held CMC responsible for non-supervisory employees removing union literature, which is unsupported by any Board precedent, as there was never even a contention that these employees were acting as agents of CMC.

In sum, we respectfully submit that based on the evidence that CMC had a regular practice of removing non-business related material from certain areas within the facility, the Board's findings of a violation are not supported by substantial evidence.

CONCLUSION

For the foregoing reasons, CMC respectfully requests that the Court grant its petition for review of the Board's findings.

Dated: August 3, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,235 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: August 3, 2018

By: /s/Raymond J. Pascucci
Raymond J. Pascucci

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2018, I electronically filed the foregoing **REPLY BRIEF OF PETITIONER**, with the Clerk of the U.S. Court of Appeals for the District of Columbia Circuit for service on:

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